No. 9916

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM JACKSON SHAW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S CLOSING BRIEF.

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The brief of appellee has studiously avoided discussing the plain error on the face of the record,—the absence and total insufficiency of the evidence to support the verdict or charge.

By its avoidance of discussion of this error, and its only discussion being that no exception was reserved to the legal sufficiency of the evidence, it implicitly concedes this vital and reversible error.

We pointed out in the opening brief that appellant was convicted of violating the Securities and Exchange Act because it is charged that he mailed or caused to be mailed three stock certificates of a California corporation from one address in Los Angeles, California, to another address in Los Angeles, California.

As stated by Judge Denman in the hearing before the court on the motion to shorten the record:

> "The vital thing in this case is to determine whether this man should go to jail for six months for mailing a stock certificate (of a California corporation) from one place in Los Angeles to another place in Los Angeles."

The learned jurist suggested that a record of five pages could set forth all that is necessary to meet the issue of appeal. Appellant agreed. Appellee required practically all the evidence which voluminously included practically all the matters relating to the mail fraud charges in counts 1 to 13 of the indictment, of which appellant was acquitted. Appellee's statement of facts therefore is so over-complete and inclusive of irrelevant matter relating to counts of which appellant was acquitted as to be misleading to the court, and refers to immaterial and unnecessary matters not within the issues of this appeal.

Appellee says:

> "Appellant cannot here question the sufficiency of the evidence, as no exception was taken, etc." (App. Br. p. 31.)

Where there is such plain error as here, where the only alleged offense is that of mailing a stock certificate of a California corporation from one place in Los Angeles to another place in Los Angeles, and a six months sentence is handed out, the court will correct such an injustice from the plain error on the face of the record, it being evident that the law has not been violated and that Congress never intended that such an act, if proved, comes within the provisions of the statute. By its failure

to argue the merits of the mailing of a letter from one address in Los Angeles to another address in Los Angeles, the appellee inferentially concedes that if the court will consider it, it is reversible error.

As said by Chief Justice Stone in *Brasfield v. United States,* 71 L. Ed. 345:

> "The failure of petitioner's counsel to particularize an exception to the court's inquiry does not preclude this court from correcting the error. *Cf. Wiborg v. United States,* 163 U. S. 632, 658, *et seq.,* 41 L. ed. 289, 298, 16 Sup. Ct. Rep. 1127, 1197; Clyatt v. United States, 197 U. S. 207, 220, *et seq.,* 49 L. ed. 726, 731, 25 Sup. Ct. Rep. 429; Crawford v. United States, 212 U. S. 183, 194, 53 L. ed. 465, 470, 29 Sup. Ct. Rep. 260; Weems v. United States, 217 U. S. 349, 362, 54 L. ed. 793, 796, 30 Sup. Ct. Rep. 544, 19 Ann. Cas. 705."

In the case of *Wiborg v. United States,* 41 L. Ed. 289, at 299, the court says:

> "We may properly take notice of what we believe to be a plain error, although not duly excepted to."

And in *Clyatt v. United States,* 49 L. Ed. 732, this court said:

> "While no motion or request was made that the jury be instructed to find for defendant, and although such a motion is a proper method of proceeding, the question whether there is evidence to sustain the verdict, yet Wiborg v. United States, 163 U. S. 632, 658, 41 L. ed. 290, 298, 16 Sup. Ct. Rep. 1127, 1197, justifies us in examining the question in case a plain error has been committed in a matter so vital to the defendant. . . . No matter how

> severe may be the condemnation which is due to the conduct of a party charged with a criminal offense, it is the imperative duty of a court to see that all the elements of his crime are proved, or at least that testimony is offered which justifies a jury in finding those elements. Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained."

The appellee, strangely enough, relies in its reply on the fact that defendant was represented in the trial by C. C. Montgomery, Esquire. (App. Br. p. 33.) The answer is contained also in the following words, "appointed by the District Court to represent appellant in the trial in the District Court."

Regardless of who represented appellant in the trial, if plain error exists he should not stand convicted of a crime of which he is innocent nor go to jail for six months because no exception was taken to one error for allegedly mailing a stock certificate from one place in Los Angeles to another place in Los Angeles, especially when the failure to except was not the defendant's failure, as he knows nothing of court procedure, but of counsel who was not of his own choosing.

Appellee concedes that as to Count 16 there was no proof whatsoever of the mailing of the stock certificate. (App. Br. pp. 39-40.) There was no exception taken to even this count, which appellee is willing to concede. This leaves but two counts for consideration.

Incidental *interstate* acts have never been regarded as interstate transportation within the meaning of congressional intent. Thus, in a white slave case the taking

of a girl across state lines in an automobile into another state for a brief visit is not regarded as "interstate transportation" within the meaning of the act forbidding interstate transportation. (*Fisher v. United States,* 266 Fed. 667.)

Likewise in labor relations cases under the Fair Labor Standard Act. the courts have held that the maxim, "*de minimus non curat lex*", should apply. (*N. L. R. B. v. Fainblatt.* 306 U. S. 601, 83 L. Ed. 1014.) See *Schechter Poultry Corp. v. United States,* 295 U. S. 495. In that case it was held that the law applies when there is a stream of interstate commerce and with the regulations of shipments which are continuous and that the law did not apply in such transactions as that of the Schechter Corporation, in whose custody the merchandise came finally to rest.

In the case of *Louis McDaniel and Bernard Silver v. Carl Claven*, Civ. No. 13610, 54 A. C. A. 248, decided by the District Court of Appeal, Second Appellate District of California, the court there held that a person suing for overtime wages under the Fair Labor Standards Act of 1938 on the theory that his erstwhile employer was engaged in *interstate* commerce during the period of plaintiff's employment, could not collect where his employment was entirely within the state, although his employer had incidental shipments from interstate commerce during a period of that time.

To give to the statute the meaning which the appellee wishes to give would be to extend the statute beyond the scope of the congressional intent and invade the field of state control over state corporations, which the statute specifically eliminates. Nor does the *incidental use* of the

mails within the state, by a state corporation, bring the acts within the forbidden portion of the statute.

The Supreme Court of the United States has repeatedly pointed out that under our dual form of government Congress has never intended to invade the field and domain of state control and regulation of its own securities. The purpose of the Act, as set forth in the Act itself, is to provide full and fair disclosure of securities sold in interstate commerce and the mails. Nor can the Securities and Exchange Commission expand its scope and field of activity to invade the state control by judicial fiat.

In *Nat'l. Labor Relations Board v. Fainblatt,* 83 L. Ed. 1018, the court said:

> "The amount of the commerce regulated is of special significance only to the extent that Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express provision or fair implication."

By express provision the Securities Act of 1933 exempts any security which is a part of an issue sold only to persons resident within a single state or territory, where the issuer of such security is a person resident and doing business within the state.

It is not to be supposed that Congress, in its attempted regulation of securities, intended to invade the domain of the state, nor to apply the law locally to transactions from one place in a city to another place in that city, for to do so would extend the operation of the law to a scope far beyond the ability to carry its operation into effective enforcement, and would make the law applicable

to practically every security no matter how small or unimportant it might be, and regardless of whether the purposes of the Act—to-wit—to provide full and fair disclosure of securities—had been complied with, in the state.

That this was not the congressional intent is further exemplified by the language of the act, which provides that the Commission itself may by its own rules and regulations exempt securities with respect to which it is not necessary *in the public interest* and for the protection of investors *by reason of the small amount involved* or the limited character of the public offering. (Section 3 (11) (b).) This, even if the security is admittedly of an interstate character and extensively sent out through the mail.

The stock of the Consolidated Mines of California was not of such a character, but was a local issue exchanged between Monolith stockholders in California and the company, and the record shows that in only a few instances was there any communication outside of the state.

Appellee says that the case of *Electric Bond and Share Co. v. Securities and Exchange Commission*, 92 Fed. (2d) 580, 586, holds that the incidental mailing of a stock certificate from one state to anothed did not change the intrastate character of a security under the holding company provisions of the Public Utilities Holding Company Act of 1935, because that Act was enacted more than two years after the effective date of the Securities Act of 1933.

Appellee has missed the point of the argument.

By a parity of reasoning we contended that where a company has business which is predominently intrastate,

such as has the Consolidated Mines of California, it need not register, even though it may occasionally make use of the mails and channels of interstate commerce.

If this is true in the case of a holding company, which Congress was very concerned about regulating although there was no express language in the Act, how much more true is it in connection with the Securities Act of 1933 as to the incidental use of the mails from one point in a city to another point in the same city, when the avowed purpose of the Act is to regulate securities in interstate commerce, and where the business is generally and predominently interstate.

Appellee says that the contention that the Corporation Commissioner issued a permit and had control of the securities and all the information which the public desired, was immaterial, and it contends, which we did not, that the issuance of such permit by a state official in fact nullifies the provisions and requirements of federal legislation.

Nothing was farther from our contention than this.

We contended that it was not the intent of Congress, in passing the Securities and Exchange Act, to remove from the state the policing power which the state itself possesses, but to supplement the power of the state where that power was inadequate to provide full and fair disclosure to the public.

The California statute provides that the Consolidated Mines had to secure a permit from the Corporation Commissioner and had to make a full showing that its business would be fair, just and equitable, and that it intended fairly and honestly to transact its business before it could secure a permit. Three permits were issued. It is the

contention of the appellant that where the matters are purely intrastate, or largely so, Congress did not and does not intend to interfere with state control of its corporations.

There is no question about the power of Congress to make provisions with respect to the use of the mails by those conducting *unlawful* enterprises. But it is not here contended, and the evidence disproves that appellant was conducting any *unlawful* enterprise. It is only contended under counts 14, 15 and 16 that he failed to file a registration statement. It is true that the appellee has made a studious effort to retry the appellant before this court on the counts of which he was acquitted, but according to our American system, the acquittal of appellant on these counts vindicates him of conducting any unlawful enterprise. The acquittal covered everything but the three counts, one of which the Government concedes is bad, and leaves only the two counts in question, involving personally owned stock.

We do not contend, as set out in appellee's brief, that Congress is limited in its power to regulate commerce and use the mails. We contend that Congress did not intend to regulate the incidental use of the mails in the transaction of securities of a state corporation within the state, as shown by the facts of this particular case.

The Indictment.

Under point I of its argument appellee says that the indictment states an offense against the laws of the United States. The indictment in this case alleges mailing a certificate of a California corporation from one place in Los Angeles to another place in Los Angeles. On its face, therefore, the indictment does not state an

offense against the laws of the United States, unless the further allegation appearing in the indictment as follows be considered a pleading sufficient to make the offense one within the statute:

> "No registration statement being in effect as to such security, and no exemption from such registration being available."

It is thus apparent that the indictment on its face states no public offense when it charges the appellant with mailing the stock of a California corporation from one place in Los Angeles, California, to another place in Los Angeles, and that the allegation contained in the indictment, above alluded to, which is a pure conclusion of the pleader, sets forth no facts that bring the acts alleged in the indictment within the inhibitions of the statutes. This is particularly true where the facts pleaded on its face contradict the conclusion. The act only provides for registration of securities which are not a part of an issue sold only to persons resident within a single state or territory where the issuer of such security is a person resident and doing business within, or, if a corporation, incorporated by and doing business within such state or territory.

Under the act the indictment on its face fails to allege a public offense against the laws of the United States, and the conclusion of the pleader, expressed in the mere generic language of the statute, as to whether there was an exemption from registration could not add anything to the indictment. Under the Act itself no offense would be charged except for this purely generic conclusion of the pleader as the indictment on its face shows an intrastate transaction exempted by the Act itself.

The Act itself also provides that the Commission may provide its own rules and regulations exempting persons from registration. These rules and regulations may change from day to day, and they are peculiarly within the knowledge of the Commission itself. Therefore, in order to apprize an accused of the exact charge he has to meet, he would be entitled to know by a proper allegation whether he was or was not within the exemptions of the rules of the Securities and Exchange Commission.

We do not deem that Congress has intended to abrogate the rules of pleading nor the constitutional guaranties that in a criminal court of the United States an accused is entitled to be informed of the nature and cause of the accusation under the Fifth Amendment to the Constitution, and for that purpose facts must be set out by which he may know of what he is accused and thereby be enabled to prepare his defense.

United States v. Cruikshank, 92 U. S. 542;
Collins v. U. S., 253 Fed. 609 (9th Cir.);
Foster v. U. S., 253 Fed. 481 (9th Cir.);
Bartlett v. U. S., 106 Fed. 884 (9th Cir.);
Salla v. U. S., 104 Fed. 544 (9th Cir.);
Boykin v. U. S., 11 Fed. (2d) 484;
Keck v. U. S., 172 U. S. 434;
Blitz v. U. S., 153 U. S. 308;
Evans v. U. S., 153 U. S. 584.

If an indictment on its face shows that a person may or may not be innocent, the presumption of innocence prevails and the indictment then is insufficient to allege a public offense.

People v. Schmitz, 7 Cal. App. 330;
People v. Davenport, 21 Cal. App. (2d) 292.

Here, the indictment on its face shows acts of innocence and the demurrer should have been sustained.

II.

The Demurrer to the Plea in Abatement Should Have Been Overruled. The District Court Erred in Sustaining It.

The Government contends that the trial court properly sustained the demurrer of the Government to the plea in abatement; that the appellant having been called before an examiner of the Securities and Exchange Commission was granted no immunity as to matters about which he testified.

The record in this case as to the proceedings before the Securities and Exchange Commission shows that appellant appeared, in response to the request, before the examiner, and answered questions. Also that subpoenas were issued [R. 97] for the books and records of the corporation (which the Government now claims was appellant's *alter ego*).

It is correct that appellant was informed by the examiner that what he might say would be used against him, but he was not advised not to answer any questions which would tend to incriminate him or subject him to a penalty or forfeiture. In obeying the mandate of the examiner, the Government claims, therefore, that although he was ordered to appear and did appear in response to the mandate of the examiner, he should have refused to obey the examiner and thus gain a legal point which, by his lawful obedience to proper authority, they now assert he cannot claim. In other words, because he was obedient and dutiful, it is asserted that he had waived his rights. But the order of policeman is a compulsion, even without his putting handcuffs on you. If his siren

blows and you fail to stop your automobile, you are apt to get shot. Does it make a person any less likely to be under compulsion because he voluntarily signs a traffic ticket which the officer writes out for him, than if he stubbornly refuses to do so, asserting that he might incriminate himself? Threats are not all physical, nor procedural. The very request of an examiner to appear is a command which contains compulsion, and it is as much compulsion as the blowing of a traffic signal by a police officer or the sounding of the siren by a traffic officer. The examiner's traffic call is co-equal. Having responded to the compulsion the Constitution guarantees the immunity.

But respondent says that the statute contains the language, "After having claimed his privilege against self-incrimination." This passage, we contend, is unconstitutional, as adding something to the constitutional guaranty. The Constitution itself does not require one to claim one's privilege against self-incrimination. It only provides that a person shall not be compelled, and we respectfully submit that Congress was without authority or jurisdiction to add to the statute a provision requiring a person to claim his privilege against self-incrimination when called before an examiner.

The case cited by respondent, *Vajtauer v. Commissioner of Immigration,* 273 U. S. 103, 113, 47 S. Ct. 302, 71 L. Ed. 560, was an immigration case and not a case of an American subject. It has been repeatedly asserted that while the rights of aliens to a fair trial and hearing are guaranteed by our Constitution and laws, such aliens are in a different position than are citizens under the Fifth Amendment to the Constitution.

Nor is this interpretation applicable to the case at bar where the statute in the Securities and Exchange Act is under attack as violative of the Fifth Amendment to the Constitution of the United States.

Since the decision in the leading case of *Counselman v. Hitchcock,* 142 U. S. 547, 35 L. Ed. 1110, all doubt has been at rest that such a provision as that contained in the instant Act is wholly insufficient to comply with the requirements of the Fifth Amendment to the Federal Constitution.

As to what protection is demanded to comply with the Fifth Amendment, the Supreme Court, in the *Counselman* case, said:

> "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. . . . In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."

The Supreme Court of California has construed the language of *Counselman v. Hitchcock* as follows in *In re Critchlow*, 11 Cal. (2d) pp. 755, 756:

> "The history of the origin of the privilege and its adoption in this country as an inviolable right by constitutional enactment has often been stated (Counselman v. Hitchcock, 142 U. S. 547 (12 Sup. Ct. 195, 35 L. Ed. 1110); . . .
>
> "It has never been questioned that, where legislation grants immunity to witnesses in return for

testimony, such testimony ceases to be self-incriminating. But in order that the immunity from prosecution be a substitute for the constitutional privilege it must, in addition to *eradicating* the self-incriminating character of the testimony to be adduced, also *exonerate* the witness from the prosecution for the offense thereby disclosed. The leading case to that effect, followed by the weight of authority in this country, holds that the immunity offered must be coextensive with and a full substitution for the constitutional prohibition. (Counselman v. Hitchcock, *supra,* followed in *In re* Doyle, *supra, Ex parte* Cohen, *supra,* and numerous other cases.) As said in *In re* Doyle, *supra* 257 N. Y. 244 (177 N. E. 489, 87 A. L. R. 418)) 'To force disclosure from unwilling lips, the immunity must be so broad that the risk of prosecution is ended altogether.' "

The Securities and Exchange Act in so far as it adds to the Constitution and requires one to claim his privilege before the Commission, even though compelled to testify, adds to the Fifth Amendment and is violative thereof.

The Transactions Involved in Counts 14, 15 and 16 Are Exempt From Section 5(a).

The appellee makes an ingenious argument against the contention of appellant that the stock certificates involved in counts 14, 15 and 16 were exempt because issued from Certificate No. 716 which, prior to reissue, has been registered and issued to McKiver, and thereafter reissued to Tyler.

However, there are several weak or void spots in its course of logic.

The first one, which is at once apparent, is that appellee leaves the reissue to McKiver out of the picture and ignores that transaction in the chain of title. Another vice and fatal weakness is the assumption of vital facts without the citation of any evidence or proof to sustain them,—which necessary evidence does not, in fact exist.

Appellee begins by disavowing the testimony of its own witness, accountant Jacobson. It is said that Jacobson's testimony that the stock involved in these counts was "private stock" is a conclusion and "could be properly stricken from the record.

Appellant does not concede that this conclusion is of a character which could be properly stricken, or that it is objectionable at all, since it was given upon a matter and by a witness properly qualified to testify to such conclusion.

However, appellant hereby makes a binding offer which will stand until this matter is submitted. He offers to have this conclusion stricken from the record and disregarded if the Government will agree that all conclusions of this witness be stricken.

We apprehend that no case was ever tried in which the evidence of the prosecutor was more nearly one continuing and complete mass of conclusions of witnesses than this case. Eliminate the conclusions of Government witnesses and there would be no case. Our offer stands as above set forth.

However, Jacobson was an expert accountant and the matters as to which he testified involved an examination of a long and involved account, including many books and records. It hardly requires citation of authorities to up-

hold the proposition that such a witness testifying under these conditions may give conclusions.

Again, the conclusion in this instance, was fully supported by Jacobson's detailed statement of the facts on which it was based. Hence the conclusion was admissible and competent.

The Government called Mr. Jacobson as its witness and immediately qualified him as an expert [R. 271]. It further qualified him by showing that he had set up the bookkeeping system and the books of Consolidated Mines; had made the entries in them over a period of several years; especially, he had written up or supervised the writing of the stock certificate journal, and had checked, as well as supervised, the work of Miss Stroatman, who made the entries which the witness did not make himself [R. 285].

It is safe to say that Jacobson's testimony, given on direct examination, is ninety per cent his conclusions, based upon his knowledge of the books and records. Also it is certain that without this testimony of Jacobson's the Government would not have the semblance of a case.

From all of which considerations respondent cannot well be heard to claim that their expert's testimony by which he not only gave conclusions, but also traced the certificate involved in counts 14, 15 and 16, is not competent.

The Issue of Personally Owned Stock Being Exempt.

Apparently, grasping at straws, appellee urges that the "burden of proof was upon appellant to establish an exemption from the provisions of section 5(a)(2) of the Securities Act of 1933." This is one of his major arguments and rates a caption on page 33 of appellee's brief.

To successfully meet and shoulder this burden was as easy a task as a litigant ever encountered. It was only necessary to cross-examine the Government's own expert witness whose testimony was the only evidence submitted which bears on this issue, and is therefore, uncontradicted. Jacobson's testimony is quoted and apparently accepted it as final, since no attempt was made to have him qualify it.

The Merits of the Issue.

On the merits appellee assumes and argues that because Consolidated Mines Company of California was the *alter ego* of appellant, and Tyler was employed by appellant. and both participated in the distribution of the stock of the corporation, *Tyler could not have any transaction, however small or private, having to do with stock of the corporation, and no matter whether it was originally issued entirely independently of and unconnected with the alleged activities of said parties in the solicitation of exchange of stocks of which complaint is made, without violating the Act.*

Appellee cites no authority which so holds, and it is clear that such a decision would judicially add language to section 77(a) and section 4(1) of the Act, which added language would be in effect as follows, "except that a transaction of such other person shall not be exempt if such person has been or is an issuer, underwriter or dealer of or in certificates of stock of the same corporation, other than those involved in said transaction, and except that, even though no public offering is involved in such transaction, if other stock of the same corporation has been or is publicly offered by the issuer, this exemption does not apply."

In other words, the section herein involved would have to be rewritten so that the word "transaction" would be deleted therefrom.

As it now reads, certain *transactions* are exempt, which *transactions* are those wherein certificates of stock are transferred by one who is not the issuer, underwriter or dealer of or in *said particular certificates;* and *transactions* in which the stock involved has not been offered publicly. As the section now reads it is of no moment that other stock issues have been included in a public offering, or that the person engaged in the transaction may have been an issuer, underwriter or dealer in other stock through some other transaction. If, in the transaction as to which exemption is claimed, the stock is personally owned and no public offering has occurred, the exemption protects the owner. He can deal with such stock privately and to do so is not required to comply with the registration provision of section 5(a).

The case of *Landay v. United States,* 108 Fed. (2d) 698, 704, relied upon by appellee, is not at all in point. There the certificates involved were an original issue of R. Cummins & Company, Inc., which the defendants formed in pursuance of their general scheme and which they absolutely controlled. The Court held that since the defendants dominated the corporation they were responsible for its acts. After quoting an excerpt from the *Landay* case, appellee's brief asserts, page 35:

> "Appellant, however, seeks to construe section 4(1) of the Act as though it exempted from the provisions of section 5(a) *all activities of any person other than an issuer, underwriter, or dealer.*" (Emphasis added.)

Appellee has failed to grasp the issue. No such claim was made in appellant's opening brief. That contention would be irrelevant to any issue presented on this appeal.

Appellant's contention has been and is as above stated. Appellant is not seeking exemption for acts of the corporation concerning these transactions. The corporation as an entity had no interest in these transactions, and did no act except the ministerial one of issuing stock as required by Tyler to Regina Woodruff, Eva Goodrich and Dr. Arnold.

There is not a word of evidence in the record to form a factual basis for appellee's assumption that either appellant or the corporation profited in any way in these transactions.

The McKiver stock was not mentioned in or covered by the partnership agreement dated July 1, 1935, which Tyler executed and by which he agreed to assign an interest in 40% of the stock of the corporation to Shaw (p. 317). The McKiver stock came to him through authorization of the corporation permit No. 3, which also authorized the issuance of the stock covered by the partnership agreement to be issued to Tyler under the conditions therein named (p. 283). But Tyler had no interest in McKiver's stock and purchased as a private transaction from McKiver, as shown in appellant's opening brief.

Our search of the transcript fails to discover any mention of the Woodruff, Goodrich and Arnold transactions, except the bare stock certificate transfers.

The issue to McKiver was an original issue from the corporation, but the corporation was not the issuer in the transaction between McKiver and Tyler, nor in those by

which Tyler passed title to Woodruff, Goodrich and Dr. Arnold.

But appellee contends that "Tyler, dominated and controlled by Shaw, purchased from the issuer with a view to distribution."

Now, this is a statement which anyone can make, but without *some* evidence to support it, this Court will hardly accept the mere assertion as sufficient to establish a fact, and an element essential of the definition of the term "underwriter," without which the Government's case must fail.

In fairness it should be recognized that this theory which ends with the conclusion that Tyler and Shaw, or both, were underwriters, is not pressed with much assurance by appellee. Its major contention is that appellant was an underwriter in these transactions under section 2(11), it being contended that these defendants sold "for an issuer in connection with the distribution"; to complete this line of reasoning, and as a basis for it, appellee says, page 37, "the record is clear that at least a portion of the money received by appellant from the sales of the Consolidated Mines of California stock was in fact used by the corporation."

From this irrelevant generality appellee goes on to argue and cite authorities as though he were attempting to uphold the Government's charges on which appellant was acquitted. Appellee has not pointed out, and it cannot name a single fact or circumstance from which it can be inferred that Tyler purchased from McKiver "with a view to distribution." On the other hand, Tyler secured the stock from McKiver in February, 1936, and held it more than a year before selling any portion of it. The

transaction with Woodruff was on May 13, 1937 (p. 343) and that with Goodrich was August 26, 1937 (p. 344).

The records show that during this period many transactions were completed involving exchanges of corporation issued stock, and if Tyler had desired to dispose of his privately owned stock he surely could have done so.

Again, there is no evidence whatever to support the assertion that Tyler was "dominated and controlled" by Shaw in any respect. Their only relations were through the partnership agreement and the employment of Tyler by Shaw for a limited time, neither of which encompass the private transactions of Tyler, either as to matters unconnected with the corporation or any which might be so connected, otherwise than through said relationship.

In the days of slavery black men were personally "dominated and controlled" by their masters, but in the absence of proof of such personal domination through force, fear, fraud, etc., a court will hardly hold that contractual domination, in any case, has involved a proprietary control over the inferior's private transactions.

Securities and Exchange Com. v. Chinese Cons. Benevolent Ass'n, 120 Fed. (2d) 738, has no bearing on the question really involved herein. The Association engaged in selling Chinese government bonds. It was held that section 4(1) of the Act was violated in that the Association was selling "with a view to" their distribution, which perfectly complies with the definition of an "underwriter" set forth in the section last named. Appellee fails to point out any fact or situation shown by the evidence *pertaining to counts 14, 15 or 16* which bears the slightest similarity to those in the *Chinese Association* case.

Correction of Error.

Appellee errs in asserting that appellant states, "There was no public offering *of the stock of Consolidated Mines of California.* (Emphasis added.) In fact, this is a clear misstatement. The emphasized language is not within the statement in the opening brief which appellee purports to quote.

Appellant's brief, p. 41, uses the subhead, "Nor Was There A Public Offering," in a thesis in which the certificates involved in counts 14, 15 and 16, and no others, were discussed. We said, and repeat, that there was no public offering of that particular stock, but appellant did not say, and had no occasion to even consider, whether there had been a public offering of *other stock than that acquired by the McKiver issues of stock* and sold to the persons named in said counts.

Appellee apparently studiously avoids discussing the origin of the very stock certificates involved in its charges. It refuses to discuss these particular transactions. That is its privilege but it should not warp appellant's language so that it, also, would become irrelevant to the issues herein.

The decision in *Securities and Ex. Com. v. Sunbeam, etc. Co.*, 95 Fed. (2d) 699, is not in point. The court of appeals said that the district court denied an injunction sought by the Commission because it concluded (p. 700):

> "The transaction by the defendants herein being solely with the stockholders of Sunbeam Gold Mines Company and Golden West Consolidated Mines, all of said stockholders being stockholders of respondent company through merger of said corporations do not, irrespective of the number of said stockholders,

involve a public offering within the meaning of section 4(1) of the Securities Act of 1933, as amended, and the plaintiff's application for preliminary injunction is therefore denied."

This was the sole issue. It was further said (p. 702):

"These Reports clearly demonstrate that the Congress did not intend the term 'public offering' to mean an offering to any and all members of the public who cared to avail themselves of the offer, and that an offering to stockholders, other than a very small number, was a public offering. . . .

"We therefore hold that an offering of securities under the Securities Act of 1933 may be a public offering though confined to stockholders of an offering company, *a fortiori* where the offerees include the stockholders of another company, though seeking to become stockholders of the offeror."

But the McKiver stock issue was not offered to any and all Monolith stockholders. As far as the record shows none of that issue was offered to anyone except those persons named in counts 14, 15 and 16.

The reply brief fails to point out a single iota of evidence which tends in any degree to show that appellant received any profit or money from the Goodrich transaction, the Woodruff transaction, or the Dr. Arnold exchange and sale. No attempt is made to show that appellant or Tyler gave any portion of the proceeds in money or property to the corporation which Tyler, alone, received in these dealings.

Appellee forgets, or ignores the fact that the issues herein involved concern counts 14, 15 and 16, alone; that it is wholly irrelevant to say, even if it were true, that

money received through the distribution of corporation owned stock pursuant to a general scheme and plan, was given to the corporation. This has nothing to do with a transaction entirely independent of said plan and in which no corporation owned stock was involved.

Appellee's brief, page 36, appropriately quotes from the House Report, 73rd Congress, that section 4(1) of the Act is in the main, concerned with the problem of distribution as distinguished from trading. In the instant case, in respect to counts 14, 15 and 16, the Commission's entire concern is trading, and the element of distribution is almost negligible.

Throughout the argument of the question which pertains to the McKiver issue of stock the appellee's brief never attempts to controvert the issue presented by appellant's opening brief, because appellee persists in ignoring the word "transactions" in section 4 and section 4(1).

Section 4 reads: "The provisions of section 5 shall not apply to any of the following *transactions:*

Subdivision (1) enumerates: "*Transactions* by any person other than the issuer; *transactions* by an issuer not involving any public offering; or *transactions* by a dealer (including an underwriter no longer acting as an underwriter, etc.)." (Italics added.)

While treating section 4 and 4(1) as though the word "transactions" had been deleted, appellee would read into them, as a substitute therefor, a provision which would nullify their effect if "such person" had been an issuer, underwriter or dealer in an original issue of corporate stock of the same corporation, or had offered such original issue to the public.

Appellant contends that since Congress intended to solve the problem of distribution of securities its concern necessarily was centered on original issues of stock by corporations by which the general public might be deceived and defrauded, and not single transactions involving only a division and reissue of a certificate privately owned, which cannot aid appreciably to the problem of distribution.

The Res Judicata Issue.

Appellee contends that the decision of *Consolidated Mines of Calif. et al. v. Securities and Exchange Com.*, 97 Fed. (2d) 704, is not the "law of the case" in this prosecution, because, it is said appellant was not a party to the former matter and "was not a director nor an officer of Consolidated Mines of California."

In that behalf it has been contended by the Government throughout the instant case, and still is, as evidenced by other portions of its brief herein, that William Jackson Shaw so completely controlled Consolidated Mines of California that it was his *alter ego;* also, it is appellee's theory that appellant dominated the every act of Tyler, who was a party to and an appellant in the former appeal.

The law of the case rule is not limited to the identical parties to a proceeding but includes those in privity with the parties, and privity denotes mutual as well as successive relationship,—such as the privity between trustee and *cestui que trust.* (*Pond v. Pond's Estate*, 65 A. 97, 97 Vt. 352, 8 L. R. A. (U. S.) 212.)

Appellee says that the entire record must be considered upon this appeal. That is to say, appellee is asking this

court to consider a mass of irrelevant matters which pertain only to charges upon which appellant was acquitted.

"The complete picture" which appellee therefore seeks to present is one that refers to matters that should properly not be here by reason of the acquittal of the appellant, and matters which, if the indictment had been on counts 14, 15 and 16 alone would never have been properly permitted to be introduced in evidence.

It is respectfully submitted, therefore, that the court will in its wisdom disregard these matters and will only decide whether the appellant violated the law in any respect and consider only evidence which is competent for the purpose of establishing or failing to establish whether the appellant caused three stock certificates to be mailed from one place in Los Angeles to another place in Los Angeles, and whether that constituted, under the competent evidence in this case, a violation of the Act; also, the evidence pertaining to the fact that the certificates were from the McKiver issue and the stock was not from a corporate issue.

For each and all of these reasons, as well as the other matters presented in the opening brief, it is respectfully prayed that the judgments be reversed.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Appellant.